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No. 319

IN THE

Supreme Court of the United States

ALEX STEINBERG, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF OF CLARENCE N. GOODWIN AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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May it please the Court:

The facts involved in this case, so far as they are relevant, are clearly stated in the Petition for Certiorari and Supporting Brief. The purpose of this brief is to reinforce the Petitioner's statement of the grounds on which it is

[1] This brief is presented agreeable to the wishes of certain organizations who feel a profound interest in the question presented but who do not wish to take formal action or have their interest revealed in view of the possibility that some might believe that they were attempting to bring the influence of their organization into the matter. While this would be, of course, unjustifiable, it is felt that their position is proper. Naturally, they understand that if the petition for the writ is not granted, it will be because of reasons which the Court believe to be compelling.

believed that the situation calls for a review of the decision of the Circuit Court of Appeals and to amplify those reasons, if possible. It is the position of the writer that there is one among many statements in the argument to the jury of the District Attorney which makes a review appear definitely required and it is that matter which this brief is intended to present.

It will, of course, be necessary to refer to other prejudicial statements by court and counsel and to other erroneous rulings of the court, for the incident should not be considered wholly apart from the circumstance in which it was made.

The definite point is that the District Attorney injected destructive racial prejudice into the case by comparing the petitioner, a Jew, with Shylock. He said:

> "I say to you greed is his motive. It reminds me of some of the famous characters in history. * * * Shylock, one of the most famous characters of Shakespeare, was motivated by greed. * * *" (Tr. 1565, Petition 50-51)

It must be pointed out at once that the fact that the petitioner was a Jew was known and commented on by the judge in sentencing him. (Tr. 1596) The question here suggested was brought to the attention of the Court of Appeals in brief and argument but brushed aside and in the opinion totally ignored. In this it is suggested the Court decided "an important question of general law in a way probably untenable or in conflict with the weight of authority." That a widespread and deep racial prejudice exists in this country unfortunately cannot be denied and a reference to the Jewish antecedents of a party has been sustained as a ground for reversal in every case in which the point has been involved except the case at bar. It is significant that the existence of this prejudice and that a reference to Jewish antecedents demands a reversal of a judgment has been specifically decided by the Court of Civil Appeals of the State of Texas, where this case was tried.

In *Garrity* v. *Rankin*, 55 S. W. 367, the Circuit Court of Civil Appeals of Texas said:

> "Counsel for defendant in his argument to the jury made statements not warranted by the evidence and indulged in remarks as to some of the parties being Jews, etc., which were calculated to prejudice the minds of the jury against the plaintiffs' cause. The court admonished him to stay in the record and told the jury it was not proper for them to consider the race of the parties or witnesses referred to and defendant's counsel then said he withdrew the remarks about the Jews.
> * * *
> "The argument of counsel in the respect alluded to was very improper and tended to create a prejudice in the minds of the jury. Whether the action of the court was sufficient to eliminate the probable effect produced we will not decide, as the case will be reversed on the other grounds and it is not probable that counsel will repeat the impropriety on another trial."[2]

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2 Attention is also called to the following cases in courts of last resort in their respective states:

Hyman v. *Kirt*, 153 Mich. 113. At page 116 the Supreme Court of Michigan, after condemning counsel for referring to plaintiff as a Jew horsetrader, said:

"We need not determine whether the withdrawal of this expression and the instructions of the court cured the error as for the admission of testimony relating to other litigation, the case must be reversed and a new trial had."

Soloman v. *Stewart*, 184 Mich. 506. In this case the Supreme Court of the state held that reference to supposed sharp practices of Jews was a ground for reversal where his name and statements of counsel implied that the plaintiff was of "Semitic antecedents".

The court had already said in *Cluett* v. *Rosenthal*, 100 Mich. 193, that a reference to plaintiffs as "men of Jerusalem" and the following of a line of argument tending to impress the jury with the belief that their nationality should be taken as evidence against them, the Supreme Court reversed the judgment on that ground. (p. 200)

Colker v. *Connecticut Fire Insurance Co.*, 7 S. W. (2d) 502. At page 505 the Court of Appeals of Kentucky said:

While the prejudice against Jews may not be as deep or as widespread as in some of the countries of continental Europe, its existence among English-speaking people is shown by their history.[3]

"This was an action on a fire insurance policy. Attorney for defendant said: 'It is a dirty, nasty Jewish trick that plaintiff is now trying to beat the insurance company by a dirty Jewish trick.'" * * *

"It was very improper for counsel in his concluding argument to appeal to race prejudice and while there was no exception taken at the time, counsel did immediately move to discharge the jury which sufficiently raised the question." The judgment was reversed.

In *Pantelis* v. *Arsht*, 227 Ill. App. 488, the court said at page 492:

"The record discloses that in the closing argument to the jury counsel for appellee said: 'This defendant is a Jew. The Bible tells the story of the Jews. This immaculate and all-powerful Sam Arsht is trying to oppress this poor Greek. This poor ignorant Greek has rights just as sacred as the Jew, if his clothes are not as fine and his fingernails not manicured as nicely. This is the old story of the big fellow trying to eat up the little fellow. * * *"

By no stretch of the imagination can such language be classed argument. It could not in any way assist the jury in reaching a just and proper verdict and should never be uttered in a court of justice. It was calculated to poison and prejudice the minds of those whose duty it was to decide the case according to the law and evidence. The fact that the court sustained an objection thereto did not destroy its poisonous effect." (Although the judgments of this Appellate Court, of which the writer was formerly a member, are reviewable by certiorari, it is otherwise a court of the last resort.)

[3] It will be recalled that in 1290, during the Crusades and while the priesthood was exhorting the people in every town and hamlet to take part therein, a great cry was raised everywhere for the expulsion of the Jews, who were considered by the population generally as sharers in the guilt of the Crucifixion and were also hated on account of usury. It was for these reasons that Edward I ex-

It is suggested that the Circuit Court of Appeals in ignoring the point here raised not only acted "in conflict with the weight of authority" but "in a way probably in conflict with applicable decisions" of this Honorable Court.

The failure of the Circuit Court of Appeals for the Fifth Circuit to sustain the point in question is "in conflict with another court of appeals on the same matter." In *Skuy*

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pelled them from the Kingdom. It may also be noted that there was no attempt to lift or modify this ban until in the time of Cromwell, over 350 years later, Lord Fairfax asked in Council that the Lord Protector be given limited authority to moderate that ban in exceptional cases and in unusual circumstances. The continuance of the prejudice is evidenced by the fact that in the century following the expulsion Chaucer's "Canterbury Tales", which marked the dawn of English literature, tells a defamatory and revolting story of a cruel and atrocious murder of a Christian child of seven years by the "Jewry" with horrifying details in which avarice, usury and murderous hatred of Christians are alleged.

The telling of this story by an author, who spent many years in Italy and had such a breadth of culture and understanding, and telling it through the sweet lips of the tenderhearted Prioress reflects the continuance of the prejudice. Three hundred years later we have the same thought and feeling emphasized and enlarged upon in Christopher Marlowe's "Jew of Malta" and not long after that there appeared the character of Shylock in Shakespeare's "The Merchant of Venice" with which we are here concerned. It there will be noted that the traits of character portrayed are not presented as those of an individual but as characteristic of the Jew, and in this case again we must remember the breadth of culture and intelligence and humanity of the authority making the characterization. The language of the play must have been known to some or all of the jury.

Shylock is made to say:

"I hate him for he is a Christian,
But more for that in low simplicity
He lends out money gratis and brings down
The rate of usance here with us in Venice.
If I can catch him once upon the hip,
I will feed fat the ancient grudge I bear him.

v. *United States,* 261 F. 316, the Circuit Court of Appeals for the Eighth Circuit condemned an argument and statement tending to count upon prejudice against the Jews. At page 320 the Court said:

> "Later in his argument the speaker again referred to the testimony of the witness Lee, and stated in substance that he did not care how many Jews the defendant brought there to testify, or what they swore to, that he believed that the soldier boy swore to the truth, that he had no interest in the case, and that every word that he testified to was the truth, and in delivering this statement he emphasized the word 'soldier.' * * *
>
> "The argument challenged was in effect a statement that in the estimation of the assistant attorney the testimony of one soldier boy, perhaps of one person who was not a Jew, to a disputed fact, was in his estimation of greater weight than that of all Jews, however truthful, upright, intelligent, and numerous, who had knowledge of the fact, and this statement was made to induce the jury to adopt that view, and to find the defendant guilty on the testimony of Lee, notwithstanding the testimony of four Jewish witnesses to the contrary. * * *

> He hates our sacred nation, and he rails,
> Even there where merchants most do congregate,
> On me, my bargains and my well-won thrift,
> Which he calls interest. Cursed be my tribe,
> If I forgive him!"

The publication of Shakespeare's works preceded the settlement of America and Shakespeare and the Bible constituted largely the substance of the settlers' literature.

It is suggested that the depth of the prejudice which has led the courts to characterize a reference to Jewish origin as poisonous is not generally understood by people of education and culture. The writer recalls that during the years when he was a partner of the late Adolph Kraus, who was for fifteen years or more and until his death President of the International Order of B'nai B'rith, he had long talks with him and tried to persuade him that prejudice and animosity against the Jew, particularly in this country, no longer existed, but without avail. Subsequent history has shown that Mr. Kraus was well informed and the writer was not."

"Counsel for the United States permitted his zeal and anxiety for success to carry him so far in this case that the conviction cannot be escaped that there was prejudicial error in this trial which prevented it from being fair and impartial."

"(4) The contention that proper objections were not made, and proper exceptions were not taken, to permit the consideration in this court of the issues which have been discussed, has not escaped attention, but it fails to convince. * * * And even if it were tenable, this is a trial for an alleged crime, it involves the liberty of the citizen, and the fault in the trial is so radical that it may well be noticed and corrected by this court without objection, exception, or assignment. * * *

"Let the judgment below be reversed, and let the case be remanded to the court below, with directions to grant a new trial."

In considering whether the importance of this case is such as to warrant the Court in issuing a writ of certiorari, certain things said in the petition in the case of *Wan* v. *United States*, 266 U. S. 1, seem relevant. In that case counsel for the petitioner, who included the Honorable Charles Fahy, later Solicitor General of the United States, said at page 12:

"That this case is of importance is demonstrated by the fact that in and by the judgment complained of human life has been declared forfeit."

It is not suggested that human life has been declared forfeit by the judgment in the instant case but, as the sentence is for eight years and the court referred to his age as sixty-one and to his health, it must have been patent to the judge that he was, in reality, giving a sentence which in all probability petitioner could not outlive. What was said by the court in regard to his age and health rests on the petitioner's testimony as follows:

"At that time I had a heart attack, the doctors put me to bed and kept me in bed off and on, you might say, three and a half years. So I immediately put my house

> in order, canceled the contract, so I could function as a salesman again, it took me over three years to do that." (Tr. 1293)

While this is stated for the purpose of showing the probable effect of the sentence, it is noted that the imposition of such a sentence exceeding all sentences so far as known for like offenses, except in the case of Al Capone, and imposed in the circumstances named is further evidence of prejudice on the part of the presiding judge.

This is in addition to the evidence of prejudice shown by the fining of Eugene Meacham, Esquire, whose ethical standards may be inferred from his long service in the office of the Chief Counsel of the Bureau of Internal Revenue and his exceptional service in the Judge Advocate General's Office of the Navy where he was promoted to be a captain. The Circuit Court of Appeals agreed that the action of the trial Judge was erroneous, but said that as it was done in the absence of the jury "it was not error in the trial." It failed to note, however, that while the sentence was imposed out of the presence of the jury, the jurymen were permitted to separate at night and the sentencing was made a matter of comment in the local press and so could hardly have escaped the notice of the jurymen.

As a further ground for the allowance of the writ in the Wan case it was noted that "its correct decision is of great and widespread interest and essential to the certain and general administration of justice in courts of the United States is sufficiently and plainly indicated from the statement made and the failure on the part of the trial tribunal sitting in the District of Columbia to accept as binding authority the opposite pronouncements of this Court of final appeal in matters of Federal cognizance sitting in all these United States."

In the present case it is suggested that the Circuit Court of Appeals, in totally ignoring the main question raised in this brief, departed from the underlying principle in *New York Central Railroad Co.* v. *Johnson,* 279 U. S. 310, where

Mr. Justice Stone, speaking for the Court, said in regard to the reference to petitioner as "an eastern railroad":

> "Such remarks of counsel and others of a similar character, all tending to create an atmosphere of hostility toward the petitioner as a railroad corporation located in another section of the country, have been so often condemned as an appeal to local and sectional prejudice as to require no comment."

The purport of what is quoted is that remarks by counsel tending to create an atmosphere of hostility are grounds for reversal and must be avoided. In its decision the Circuit Court of Appeals utterly ignored this principle.[4]

Incidentally, evidence of the presence of the dictaphone in petitioner's room was proper and the irritation shown by the judge who fined Mr. Meacham in connection with that incident was unjustifiable. In the Bridges case, in which the writer acted as senior counsel for the Government, counsel for the alien sought to reopen the case and present evidence that the alien's telephone had been tapped. Judge Sears properly refused to reopen the case because the supposed wire tapping occurred between August 5th and August 22nd, while the hearing had been concluded June 12th. It was not suggested that the same action would have been taken had the wire tapping occurred during the hearing. Here an attempt to present evidence connected with the presence of a dictaphone seems to have been proper and

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[4] The comment on the presence of Washington Attorneys comes within this condemnation and although it was brought to the attention of the Court of Appeals it was disregarded.

The District Attorney asked on cross-examination (p. 1567):

> "Q. As a matter of fact you did not have your defense until your Washington lawyers got down here and got ready to try this case did you?"

Obviously this implicit appeal to local and sectional prejudice comes within the condemnation of this court noted above.

the action of the judge would seem to indicate an angry hostility.

The writer has indicated that the main incident complained of in this brief should not be considered separate and apart from other actions of court and counsel and in this connection the action of the United States Attorney in denouncing the petitioner as one who had made early a million dollars in black marketing "at a time when this nation was in a splendid effort to avoid the catastrophe of wild inflation" was a clear attempt to arouse the prejudices and passions of the jury against the petitioner as an unpatriotic citizen and comes clearly within the actions complained of in an editorial in the Harvard Law Review of May 1920.[5]

In *United States* v. *Licht*, 158 F. (2d) at page 462 it is said that an improper reference to the war in progress can-

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[5] "LAWLESS ENFORCEMENT OF LAW.—During the past year no less than forty-four convictions were reversed by appellate tribunals in the United States for flagrant misconduct of the public prosecutor or of the trial judge whereby the accused was deprived of a fair trial. In thirty-three of these cases the district attorney made inflammatory appeals to prejudice upon matters not properly before the jury. * * * Appellate courts interfere reluctantly in these cases and set aside convictions only when convinced that the conduct of the district attorney was flagrant and highly prejudicial. Hence it is a fair inference that the evil is even more extensive than the face of the reports discloses. * * *"

In his address at the Centennial Celebration of Harvard Law School June 21, 1920 the Honorable Charles Evans Hughes said:

> "And in the conduct of trials before the courts we find a growing tendency on the part of prosecutors to resort to grossly unfair practices."

While the librarian of this Court states that this address was printed with that of Roscoe Pound under the title "Two Addresses Delivered before the Alumni of the Harvard Law School at Cambridge, June 21, 1920" and believes that there is a copy of this address in the Library of Congress, search there has been unavail-

not be cured by a judge's admonition to disregard it, citing many cases.

See also *August* v. *United States*, 257 Fed. 388.

SUMMARY.

While this brief is addressed to a single point, it seems proper here to summarize what has been said here regarding other related matters.

The Circuit Court, in disregarding the fact that the District Attorney characterized the Jewish petitioner as a greedy, grasping Shylock, acted in conflict with a decision in the Eighth Circuit.

In so doing it also acted on an important question of general law in conflict with all the known cases and in a way probably untenable.

It has disregarded the admonition of this Court to prevent prejudicial statements of counsel tending to create prejudice.

It has sustained the presiding judge in unjustly fining petitioner's counsel for contempt in circumstances which made it evident that that action would, in regular course, come to the knowledge of the jurors.

It has sustained the exclusion of competent and relevant evidence contrary to the uniform decisions in other jurisdictions and has thus decided an important question relating to the law of evidence in a way probably untenable and certainly contrary to the decisions of all courts wherever the question has arisen. (Pet. pp. 38-42)

It sustained the trial court in permitting the District Attorney to bring prejudice and passion into the case by denouncing petitioner as one acting illegally, selfishly and greedily during the war while others were making great

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ing up to this writing. The quotation is, therefore, copied from "The Case of Sacco and Vanzetti" by Felix Frankfurter, page 63, and in certain respects the situation in that case is analogous to the situation in the case at bar.

sacrifices to secure its successful termination, all of which has been uniformly condemned.

There are other compelling reasons for a review set out in the petition, but what is noted in this summary seems sufficient to justify the Court in granting the writ.

Years ago the writer chanced to hear an Easter sermon in which the learned divine pointed out that the words "Justice and Righteousness" were translations of a single Greek word and that Justice and Righteousness were, in reality, one and the same thing.

It may be noted that Macedonius, bishop of Constantinople, was deprived of his office by the Council of Constantinople in the year 360 as "he openly professed that the Holy Spirit is a divine energy diffused throughout the universe and not a person. * * *" It is respectfully suggested that it is the function of this Court to see that the divine energy of righteousness is diffused not only throughout the circuit courts of appeal but in all judicial proceedings in all courts and, to use a phrase appearing in the petition in the Wan case, "sitting in all these United States."

Respectfully submitted,

CLARENCE N. GOODWIN,
Amicus Curiae.

The respondent consents to the filing of this brief.

.....

The consent of counsel for the petitioner to the filing of this brief is submitted herewith.